No. 15432

In the United States Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MILDRED IRENE SIEGEL, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE PETITIONER

CHARLES K. RICE,
Assistant Attorney General.

ELLIS N. SLACK,
LEE A. JACKSON,
HELEN A. BUCKLEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

Statute:

In the United States Court of Appeals for the Ninth Circuit

No. 15432

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MILDRED IRENE SIEGEL, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

---

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Tax Court (R. 30-42) is reported at 26 T.C. 743.

JURISDICTION

This petition for review (R. 43-45) involves federal gift tax for the taxable year 1950. On February 8, 1954, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of $51,144.24. (R. 12-15.) Within ninety days thereafter and on April 29, 1954, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R.

6-15.) The decision of the Tax Court was entered October 3, 1956. (R. 42-43.) The case is brought to this Court by a petition for review filed December 20, 1956. (R. 43-45.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Taxpayer's wife elected to take under the terms of her deceased husband's will in lieu of taking her share of the community property, the will providing that she was to have a life estate in all the community property plus a specific bequest. Should the amount of the gift by the wife resulting from such election be measured by the wife's one-half of the community reduced only by the present value of the life estate she retained therein, or should it be further reduced by the present value of her life estate in the husband's one-half of the community and by the specific bequest?

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real

or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

(26 U.S.C. 1952 Ed., Sec. 1000.)

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

(26 U.S.C. 1952 ed., Sec. 1002.)

STATEMENT

This case involves a gift tax for the year 1950 in the amount of $46,829.37. Most of the facts were stipulated (R. 18-29) and so found by the Tax Court (R. 31-36).

The taxpayer is a resident of California. (R. 31.) Her husband, who died in 1949, left an estate consisting of community property, in all of which the taxpayer had a vested one-half interest. (R. 32.) The husband's will purportedly disposed of the entire community estate despite the vested interest of the taxpayer in her half of the community. Under the will the taxpayer was given a life estate in the community along with a specific bequest of $35,000 and certain specified items of real and personal property. It was provided that the provisions on behalf of the

wife were made in lieu of her community rights and that if she elected to take her community interest then she would not take under the terms of the will. (R. 32-34.) The taxpayer elected to take under the will in lieu of her community property rights. (R. 34.)

The Commissioner of Internal Revenue determined, and was upheld by the Tax Court, that this election constituted a gift by the taxpayer to the remainderman of the trust set up by the husband. The sole controversy to be determined upon this review is the valuation to be placed upon such gift. It is the position of the Commissioner that the gift must be measured by the wife's one-half of the community reduced only by the life estate she retained in such one-half. The Tax Court held that the taxpayer made a gift to the extent of her one-half of the community estate less the life interest she retained in such one-half reduced further by the value of the life estate received by her in the other one-half of the community and by the $35,000 bequest. (R. 30.)

From this decision the Commissioner here petitions for review. (R. 43-45.)

STATEMENT OF POINTS TO BE URGED

1. The Tax Court erred in holding that the amount of the gift should be measured by taxpayer's community one-half reduced by the present value of her life interest in the entire community and a specific bequest granted to her by the terms of the will.

2. The Tax Court erred in failing to hold that the amount of the gift should be measured by taxpayer's

community one-half reduced only by the present value of the life estate that she retained therein.

SUMMARY OF ARGUMENT

The only question on review is the matter of evaluation of the gift made by the taxpayer to the remainderman of the trust. The Tax Court proceeded upon the premise that the property which the taxpayer received under the terms of her husband's will constituted consideration for the transfer which she made by her election to take under the will, and accordingly deducted from the amount of the gift made the bequests received by the wife under the will. In this the Tax Court erred. The entire transaction was donative in character and the taxpayer received no consideration whatsoever, adequate or not, for making the election. The Tax Court failed to make the basic distinction between the *motive* for the taxpayer's action and the *consideration* for such action. While the terms of the husband's will may certainly have strongly motivated the taxpayer in her election, the terms could not constitute consideration for the election. What she received from her husband's estate was solely through the largess of her husband. There was not present the bargain or agreement between the taxpayer and her husband necessary to constitute these bequests as consideration, and obviously it was not possible for them to have reached such bargain or agreement. Nothing is consideration that is not regarded as such by both parties, and this Court has stated that consideration will not be presumed. Accordingly, the Tax Court erred in consid-

ering the acquisitions of the wife under the terms of her husband's will as consideration for the gift which she made to the remainderman, and the decision should be reversed.

ARGUMENT

The Gift By the Taxpayer Is Measured By the Value of Her Community Interest Reduced Only By the Life Estate That She Retained Therein

The only point at controversy in this review is the evaluation to be placed upon the gift which the Tax Court held was made by the taxpayer to the remainderman of the trust set up by her husband. That a gift of some amount was made is clear from the facts and applicable law and was the holding of the Tax Court. Since the taxpayer has not appealed from this holding, it may be disregarded entirely for the purposes of this review and our sole attention is accordingly directed to the matter of the evaluation of the gift.

The Commissioner has consistently contended that the taxable gift made by the taxpayer should be measured by the value of her interest in the community less the life estate which she retained in that community interest. It is the position of the taxpayer, on the other hand, that the gift consisted of her share of the community less the life estate she retained therein, further reduced by that which she received under her husband's will: the life estate in her husband's share of the community and the specific bequest of $35,000. The Tax Court in this respect agreed with the taxpayer and stated (R. 37):

> We have recently enunciated the basic principles applicable to situations of this type in *Chase National Bank*, 25 T.C. 617.* It is clear from a reading of that case that petitioner must be considered as having made a gift to the extent that the value of the interest she surrendered in her share of the community property exceeded the value of the interest she thereby acquired under the terms of Irving's will.

The premise upon which the Tax Court implicitly based its decision could only have been that the property which the taxpayer received by the terms of her husband's will constituted consideration for the transfer which she made by her election to take under the will. Section 1002, *supra*, of the Internal Revenue Code of 1939 provides—

> SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.
>
> Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

The decision of the Tax Court must necessarily have presupposed that there was some consideration involved in this case, and in such a supposition, it is submitted, lies the fallacy in the Tax Court's view.

---

* Appeal by the Government pending in the Court of Appeals for the Fifth Circuit.

This entire transaction was donative in character and the taxpayer received no consideration whatsoever, adequate or not, for making the election.

The Tax Court has done here that which was long ago condemned by the Supreme Court in another situation: it has failed to distinguish between the *motive* for doing something and the *consideration* received for such undertaking. "It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract." *Philpot* v. *Gruninger*, 81 U.S. 570, 577. The taxpayer, in making this election, may certainly have been strongly influenced one way or the other by the provision which her husband had made for her in his will, but this fact alone does not make the bequests received consideration for the gifts which she made. The taxpayer received a life estate in her husband's share of the community and the bequest of $35,000 solely by the largess of her husband. Although the husband's gift by will may have been contingent upon the fulfillment of certain conditions by the taxpayer, it was nonetheless a gift. Indeed there could not have been the bargain or agreement between the taxpayer and the husband necessary to constitute these bequests as consideration under the circumstances of this case where the husband was already deceased at the time of the transfer. The Tax Court failed to hold that there was any arm's length bargain such as is usually associated with transfers for consideration. "Nothing", said the Supreme Court in *Philpot, supra*, p. 577, "is consid-

eration that is not regarded as such by both parties." See also *Fire Insurance Assn.* v. *Wickham*, 141 U.S. 564. At the time of the taxpayer's gift her husband clearly could not have regarded his bequest as consideration for her election. Additionally, there has not been and could not validly be any contention put forth that the beneficiary of the wife's bounty, the remainderman of the trust, put up any consideration for the action of the wife in making the election to take under the terms of the will in lieu of her community property rights.

That there was no consideration for a similar election by a wife was succinctly set forth by the Court of Appeals for the Second Circuit in a case involving the common law rights of the wife to dower. *Warner* v. *Commissioner*, 66 F. 2d 403, certiorari denied, 290 U.S. 688. In denying the Commissioner the right to tax as income the difference between the wife's dower interest and what she received under a will setting up provision for her in lieu of her dower interest, the court stated (p. 406):

> But it does not follow that the widow's share under the will is not taken by bequest, at least to the extent that her share under the will exceeds the value of her right of dower. A testator's provision for his widow in lieu of dower is simply a gift conditional upon her giving up the dower. The condition attached to the gift may indeed operate as an inducement to her to relinquish her statutory rights. But, to the extent that her share under the will exceeds her rights as widow, she clearly accepts the bounty of the testator, and gives nothing in consideration therefor by way of purchase.

The Court in *Warner* has made the clear distinction between the inducement to do something and the consideration for such action as was set forth in *Philpot, supra.* The Tax Court erred in failing to recognize this difference. See also the dictum of the Fifth Circuit in *McFarland* v. *Campbell*, 213 F. 2d 855, 857: "In order that the necessity of an election shall take place, the testator must affect to dispose of property which is not his own, and also make a valid *gift* of his own property." (Italics supplied.)

The mere statement by the taxpayer that the transfer which she made was in return for the "consideration" which she received under the terms of her husband's will is not sufficient to turn the bequests of the husband into "consideration" of any legal efficacy. There is nothing at all to show that the bequests by the husband were other than donative in intent and in effect, and there is no valid reason for a contrary inference. Consideration should not be presumed. See *Commissioner* v. *McLean*, 127 F. 2d 942 (C.A. 5th). The situation is similar to that before this Court in *Giannini* v. *Commissioner*, 148 F. 2d 285, certiorari denied, 326 U.S. 730, where property was placed in trust as a result of a family arrangement and it was contended that there was a transfer for an adequate and full consideration in money's worth and not a gift. In holding that there was a gift and not a sale, this Court stated (p. 287):

> Neither do the facts show any consideration in money or money's worth for the decedent's transfer of property to the trust. True, the decedent received an income interest in the family trust

> worth more in money than the property he transferred to the trust. The disproportionate value of the income received resulted, however, not from bargaining but from the largess of the parents in donating a substantial sum for their children's financial security.

Here too there was no bargaining done by the taxpayer with either her deceased husband or with the remainderman of the trust, her young son. She received nothing as consideration for making the election. Whatever she acquired under the terms of her husband's will came to her not by way of sale or exchange but rather as a pure gift from him. Accordingly, the Tax Court erred in considering such acquisitions under the terms of her husband's will as consideration for the gift which she made to the remainderman.

CONCLUSION

It is urged that for the reasons set forth above, the Tax Court erred in its holding that the gift which was made by the taxpayer should be reduced by the bequests she received under the terms of her husband's will, and this decision should be reversed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

ELLIS N. SLACK,
LEE A. JACKSON,
HELEN A. BUCKLEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

MAY, 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 426988 1292